

Guidelines:

Permit Shield

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What is a Permit Shield?

A permit shield is specific permit language that, if properly written, can protect the source from enforcement of an applicable requirement under two circumstances:

- 1) A requirement applies to the source and a title V permit condition explicitly includes the requirement, (including through a streamlined permit condition) OR
- 2) A requirement does not apply to the source and the title V permit includes a demonstration of why the requirement does not apply.

The permit shield protects sources only from enforcement of violations that happen at the time the shield is in place.

A source may request the permitting authority to include a permit shield in the title V permit under 504(f) of the CAA, and §70.6(f).

Why Review Permit Shields?

Review all permit shields carefully because of the implications for enforcement.

- *If there is no shield* in the title V permit for an applicable requirement, an enforcement action may be brought against the source for violation of both the rule or permit containing the applicable requirement and the title V permit itself.
- *If there is a shield* in the title V permit for an applicable requirement, an enforcement action may ONLY be brought against the source for a violation of the title V permit.

Shields can pose enforcement problems. For example, a permit might shield a requirement that is wholly or partially missing from the permit, or state incorrectly that an applicable requirement does not apply. A poorly crafted permit shield may create enforcement problems, until EPA or the permitting authority reopens and corrects the permit.

Shields can be beneficial. The benefit of a well-crafted permit shield is that it clarifies which requirements apply to a source and allows streamlining of overlapping requirements to take place. For requirements that apply to a source, a well-crafted shield does not pose a problem if the requirement is fully included in the title V permit, because violations may still be enforced through the title V permit. For requirements that do not apply to a source, a well-crafted shield does not pose a problem because there is no potential for a source to violate a non-applicable requirement.

See Streamlining Guidelines for information on the role of permit shields in streamlining.

How Do I Review a Permit Shield?

Review each permit shield to make sure it does not exempt the source from a requirement to which the source is subject or to which the source may become subject in the future. Your review differs depending on the purpose of the shield.

When reviewing a title V permit that contains a shield for applicable requirements that are included in the permit,

- Compare the language in the applicable requirement to the title V permit condition to verify the permit language accurately and fully captures the applicable requirement and that the title V permit condition is identified as being federally-enforceable.

Once this has been confirmed, make sure the shield

- Applies only to requirements and units captured in the permit.
- Identifies the version of the applicable requirement that is being shielded.
- Applies only to the requirements and units eligible for a shield.

Example Permit Shield for an Applicable Requirement

If the Applicable Requirement Reads...	And the Title V Permit Reads...	Then the Permit Shield May Read...
SIP Rule 300 Section 3: Each unit must meet an emission limit of 5 lbs of SO ₂ per hour averaged over a three-hour period.	Unit 1 must emit no more than 5 lbs SO ₂ per hour averaged over a three-hour period. (SIP Rule 300 Section 3, Adopted 8/14/94)	For Unit 1, compliance with the conditions of this permit shall be assumed to be compliance with SIP Rule 300, section 300.3.

When reviewing a title V permit that contains a shield for requirements that are shielded because they do not apply to the source,

- Review the permit conditions to assure the source could not trigger the requirement at a later date.

After this has been confirmed, make sure the shield

- Lists explicitly the requirements that are not applicable.
- Includes an explanation of why the requirement does not apply.
- Identifies the version of the applicable requirement being shielded.
- Applies only to requirements and units eligible for a shield.

Example Permit Shield for Non-Applicable Requirement

If the Statement of Basis Reads....	And the Title V Permit Reads....	Then the Permit Shield May Read....
NSPS subpart CC only applies to sources using arsenic as a raw material in the glass manufacturing process. The source does not use arsenic, and a permit condition has been added to the permit to prohibit use of arsenic.	The permittee shall not use arsenic as a raw material or as a component of a raw material in any glass manufacturing process.	New Source Performance Standard Subpart CC has been determined not to apply to this facility. (The NSPS applies only to sources using arsenic).

Tips for Review Of Shields Covering Applicable Requirements

Issue/Example	Explanation	Correction
<p><u>Permit fails to capture all shielded requirements:</u></p> <p>For example, a permit contains a shield for a SIP rule. When comparing the SIP rule to the title V permit conditions, you see the emission limits have been included in the permit, but the applicable recordkeeping and testing requirements have not been incorporated.</p> <p>Or</p> <p>A permit contains a shield for a PSD emission limit. When comparing the PSD permit to the title V permit conditions, you see the title V permit does not contain the averaging time from the PSD permit.</p>	<p>§70.6(f)(1)(I) allows applicable requirements to be shielded if the applicable requirement is included and is specifically identified in the title V permit. The shield makes requirements enforceable only through the title V permit.</p> <p>A permit shield may not be provided for a given rule or portion of a rule unless the shielded requirement is fully captured by a permit condition (or is explicitly deemed not applicable). If a permit condition is written that addresses a rule's emissions limit but not its recordkeeping requirements, a shield for that rule may create enforcement problems regarding the source's obligation to comply with the recordkeeping requirements of the rule. Because granting a shield may create enforcement problems, it is extremely important that the permit condition fully and accurately capture the requirements of the shielded rule.</p>	<p>Require inclusion of permit conditions that fully capture missing applicable requirements or components thereof such as:</p> <ul style="list-style-type: none"> emission limits averaging times monitoring recordkeeping reporting testing

Tips for Review Of Shields Covering Applicable Requirements

<u>Issue/Example</u>	<u>Explanation</u>	<u>Correction</u>
<p><u>Permit shield applies to requirements not included in the permit (shield is too broad):</u></p> <p>For example, a shield that reads: “Compliance with the permit conditions shall be considered compliance with ALL applicable requirements.”</p> <p>Or</p> <p>“Compliance with the permit conditions shall be considered compliance with 40 CFR 60.”</p>	<p>§70.6(f)(1)(I) allows permit shields only for requirements that are “included and specifically identified in the permit.”</p> <p>There are practical reasons for part 70's requirement to make shields specific. Lack of specificity increases the possibility of creating a shield for a requirement that is wholly or partially missing from the permit. Specific shield language makes it possible to confirm that all shielded requirements are fully captured in the permit.</p>	<p>Prevent un intentional shielding of applicable requirements that are not specifically included in the permit by requiring broad permit shield language to be re-written.</p> <p>Require that the shield identify the rules, permits, or sections thereof that are addressed in the permit.</p> <p>If only certain units are eligible for the shield, make sure that these units are identified in the shield.</p> <p>For example, if the permit contains all the applicable requirements from SIP rules A and B, require the shield be revised to read: “Compliance with the permit conditions shall be considered compliance with SIP Rules A and B.”</p>
<p><u>Compliance with the shielded requirement cannot be determined based on currently available information:</u></p> <p>For example, the permit provides a shield for an applicable requirement, where the applicable requirement requires the source to develop a source-specific plan, for example, a CAM plan under the CAM rule or an O&M plan under a SIP rule.</p>	<p>Where a plan has not yet been developed and incorporated into the title V permit, compliance with the plan cannot be assured through the title V permit. If these plans are not incorporated into the permit at time of permit issuance, then the plans have not been reviewed by the permitting authority, public or EPA to determine whether the plans comply with the applicable requirements. Therefore, a shield must not be extended to this requirement.</p> <p>In general, a shield cannot be extended to future obligations that cannot be defined as they apply to specific units at the time of permit issuance.</p>	<p>A permit shield should not be extended to requirements such as these because a source that has developed an insufficient plan could be shielded from the requirement to develop an adequate plan.</p> <p>Make sure that a shield is not extended to this applicable requirement unless the permit incorporates the plan and the plan has already gone through the review required by the applicable rule or permit.</p>

Tips for Review Of Shields Covering Non-Applicable Requirements

Issue/Example	Explanation	Correction
<p><u>Shielded requirement is potentially applicable:</u></p> <p>For example, a shield may state that 40 CFR 60 subpart CC is not applicable because the source does not use arsenic in its process and CC applies only if arsenic is used. However, your review shows that there is nothing in the permit or relating to the source's operations that prevents the source from using arsenic in the future.</p> <p>Or</p> <p>The shield states that 40 CFR 60 subpart CC does not apply because the unit was constructed before the subpart's effective date, and the unit has not since been modified. However, your review shows that there is nothing from preventing this subpart from becoming effective if the source modifies in the future.</p>	<p>Some requirements clearly do not apply to a source and could not be triggered in the future. However, some requirements do not apply because of the way a unit is currently operated. If the permit allows the source the flexibility to change its operations, then it is possible that a non-applicable requirement could become applicable at that time. This may happen if the unit modifies (NSPS may be triggered when units modify) or if a unit uses different fuels or raw materials.</p> <p>If a requirement that is shielded may become applicable in the future, this creates a problem. In this situation, the source would be shielded from enforcement of that requirement until the permit was reopened to remove the shield.</p>	<p>The statement of basis or other supporting documentation must provide enough information to justify this applicability determination. For example, NSPS applicability is often based on maximum capacity of the process unit and the date of construction or modification of the process unit. To justify that an NSPS does not apply, the statement of basis would need to show that a unit's maximum capacity is below the applicability threshold, or that no modification (as defined in §60.14) or reconstruction (as defined in §60.15) has occurred since the effective date of the NSPS.</p> <p>Where the requirement is not applicable because of the construction date, the permit shield may be revised in a way that either</p> <ul style="list-style-type: none"> • the source is prohibited from modifying or • the shield becomes void if the unit is modified. <p>Where the requirement is not applicable because the source does operate in a certain way, either</p> <ul style="list-style-type: none"> • the permit must prohibit the source from operating in a way that would trigger the requirement, or • the shield must be modified to include a statement that the shield is void if the source operates in a way that would trigger the requirement.

Tips for Review Of Shields Covering Non-Applicable Requirements

<u>Issue/Example</u>	<u>Explanation</u>	<u>Correction</u>
<p><u>Permit shield does not contain a demonstration or a concise summary thereof:</u></p> <p>For example, a permit’s statement of basis explains that 40 CFR 60 Subpart OOO (Standards of Performance for Nonmetallic Mineral Processing Plants) is not applicable to a permitted stockpile, because under 40 CFR Subpart 60.671, transfers to stockpiles are specifically exempted from Subpart OOO. However, the permit shield states only that Subpart OOO does not apply to this stockpile.</p>	<p>§ 70.6(f)(1)(ii) states that where a shield specifically determines that a requirement is not applicable, the permitting authority must make this determination in writing, and the permit must include the determination or a concise summary thereof.</p>	<p>The permit shield must be amended to include the determination of non-applicability:</p> <p>“The following requirement is not applicable to [a specific source or emissions unit] because [summary of reason from statement of basis].”</p>

Tips for Review of All Shields

<u>Issue/Example</u>	<u>Explanation</u>	<u>Correction</u>
<p><u>Permit shield fails to identify version of shielded requirement:</u></p> <p>For example, a shield is included in a title V permit for “SIP Rule 100.” At a later date, a new more stringent version of SIP Rule 100 is approved into the SIP. Until the title V permit is reopened to include the new rule, it does not assure compliance with SIP Rule 100. However, because the shield language applies to “SIP Rule 100,” it could be read to apply to the new applicable requirement.</p>	<p>Title V permits can generally only be written to assure compliance with requirements in existence at the time of permit issuance. Different versions of one rule often exist. Federal and State rules often change while retaining the same name and numbering. The result of permit shield language that does not specify the version of the shielded requirement may be that compliance with the title V permit no longer assures compliance with current version of the applicable requirement.</p>	<p>Make sure that the shield applies only to requirements considered in drafting the permit.</p> <p>To achieve this, the version of the rules that are included in the permit shield must be identified. There are at least three ways to do this:</p> <ul style="list-style-type: none"> ● The adoption or approval date of the rule may be cited in the origin and authority of the individual permit conditions, ● The adoption or approval date of the rule may be cited in the permit shield itself, or ● The shield may state that the versions of the rules that are in the SIP (or are otherwise identified as federally-enforceable) as of the effective date of the permit are shielded.
<p><u>Permit shields source from past or potential future case-by-case analysis requirements:</u></p> <p>For example, a permit shield states that compliance with the permit assures compliance with all past and/or future NSR requirements.</p>	<p>Rules such as construction permit rules must be applied on a case-by-case basis to each construction or modification. It is difficult, without a detailed history of the source, to determine whether any particular unit can be shielded from past requirements. Since shields are only intended to cover “compliance with any applicable requirements as of the date of permit issuance...” (see §70.6(f)), the permit cannot “assure compliance” with these rules for such future actions. As a practical matter, it would generally not be possible to anticipate the case-by-case requirements that would apply to future changes at a source, therefore the permit could not assure compliance with these requirements. Thus, rules requiring case-by-case analysis can not generally be covered by a shield.</p>	<p>For shields that apply to past requirements, determine whether there is a detailed demonstration provided for each unit covered by the shield showing either that compliance is assured by the permit or that based on the unit’s history since construction, a determination of non-applicability can be made. If an adequate demonstration cannot be provided, a shield from past requirements cannot be extended to a unit.</p> <p>Require that any shields that apply to future requirements be removed from the permit unless all of the future requirements are known and the permit either assures compliance with, or contains conditions assuring non-applicability of, the requirement.</p>

Tips for Review of All Shields

<u>Issue/Example</u>	<u>Explanation</u>	<u>Correction</u>
<p><u>Shield covers ineligible requirement:</u></p> <p>For example, a shield covering the requirements of the state or local part 70 rule.</p>	<p>Most applicable requirements, as defined in a permitting authority's title V program, are eligible to be covered by a permit shield. However, there are certain applicable requirements that part 70 states may not be covered by a permit shield. Also, the §70.6(g) language on permit shields specifically states that the shield language is "compliance with the conditions of the permit shall be deemed compliance with any applicable requirements..." This indicates that only applicable requirements may be shielded. Because part 70 requirements are not "applicable requirements" (See definition of applicable requirement in §70.2), part 70 requirements may not be shielded.</p> <p>For more information on what requirement can and can't be shielded, see the following table.</p>	<p>Make sure that any requirements that are shielded are eligible for a shield (see table below for assistance). If an ineligible requirement is shielded, the shield language must be removed from the permit.</p>

What MAY Be Covered by a Shield?	What CAN'T Be Covered by a Shield?
<ul style="list-style-type: none"> Most applicable requirements, as defined in permitting authority's title V program 	<p>The following CAA requirements:</p> <ul style="list-style-type: none"> Section 303 (Emergency orders) Title IV (Acid rain requirements) Section 114. (Enforcement provisions. See §70.6(f)(3)) Part 70 requirements and the related State or local rule requirements. This is because the permit shield may only apply to applicable requirements. Part 70 requirements are not applicable requirements.
<ul style="list-style-type: none"> Emission caps allowed under §70.4(b)(12)(iii). 	<ul style="list-style-type: none"> Emission trading provided for under a SIP-approved rule. For more information, see §70.4(b)(12)(ii) and §70.4(b)(12)(ii)(B)

What MAY Be Covered by a Shield?	What CAN'T Be Covered by a Shield?
<ul style="list-style-type: none"> • Administrative amendments incorporating preconstruction review permit requirements issued under a SIP-approved program that substantively meets the requirements of §§70.6, 70.7, and 70.8. • Significant permit modifications. 	<ul style="list-style-type: none"> • Minor permit modifications. See §70.7(e)(2)(vi) • Section 502(b)(10) changes. Section 502(b)(10) of the Act allows sources to make changes to their permit which may contravene existing permit conditions. For more explanation, see §70.4(b)(12)(I)(B) and preamble pages 57 FR 32266-32269. • Off-permit changes. Part 70 allows sources to make certain changes “off-permit” (without going through a permit revision) if the change is not addressed or prohibited by the permit. For more explanation, see §70.4(b)(14)(iii) and preamble pages 57 FR 32269-32270.
	<ul style="list-style-type: none"> • Past noncompliance. See §70.6(f)(3)(ii).

Other Permit Shield Topics

Must a Permit Shield be Included for Streamlined Permit Conditions?

Permit shields are recommended for permits with streamlined applicable requirements described in WP2. SEE Guidelines on Streamlining and WP2 pages 8, 14 (step 6) 16, and 19.

What’s the Difference between an Application Shield and a Permit Shield?

Permit shields should not be confused with the “application shield,” which is granted a source if it submits a permit application that meets the requirements for submitting a timely and complete application under §70.5(a)(2) and §70.7(b) (See also §503(d)). The application shield allows a source to operate without a title V permit.